Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

DOCKET NO. ____

In The
SUPREME COURT OF THE UNITED STATES

ZORA ENTERPRISES, INC.
PETITIONER

vs.

COMMONWEALTH OF MASSACHUSETTS
RESPONDENT

On Petition For Writ Of Certiorari To The Supreme Judicial Court For The Commonwealth Of Massachusetts

PETITION FOR WRIT OF CERTIORARI

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Counsel of Record
For the Petitioner
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2318

QUESTION PRESENTED FOR REVIEW

1. Has the Commonwealth of Massachusetts caused a taking by delaying a decision in a wetlands proceedings for five years on the issue of the sufficiency of the information submitted by Zora Enterprises, Inc., during which time the merits of the project were not decided?

PARTIES

Diane Boretos was also a defendant in the state court case.

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS

Zora Enterprises, Inc. vs. Commonwealth of Massachusetts and Diane Boretos, Plymouth Superior Court
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Appendix A

Zora Enterprises, Inc. vs. Commonwealth of Massachusetts and Diane Boretos, Massachusetts Appeals Court
(docket no. 98-P-195)
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Zora Enterprises, Inc. vs. Commonwealth of Massachusetts and Diane Boretos, Massachusetts Supreme Judicial Court
(docket no. FAR 10561)
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JURISDICTION

The Petitioner seek review of a decision of the Massachusetts Supreme Judicial Court dated June 3,1999 which denied the Petitioner's Petition for Further Appellate Review.

Jurisdiction is conferred by 28 U.S.C. 1257.

Provisions Involved in Case

The following provision of the Fifth Amendment to the U.S. Constitution is involved in this case:

"...nor shall private property be taken for public use without just compensation."

Statement of the Case

Statement of Facts

Zora Enterprises, Inc. owns approximately 8 acres in Marion, Massachusetts off of the Northerly end of Olde Meadow Road. The property is part of the property acquired by Joseph P. Zora, Sr. and his wife, Glenna M. Zora, by a deed from James Hartley dated September 4, 1963. Joseph and Glenna Zora purchased the property with the expectation that they would subdivide the land, construct roads and utilities and sell residential house lots. At that time and continuing through to the present the subject property was located within a zone called "Residence B" under the Town of Marion Zoning By-Laws. Use of the property for the development of residential house lots is dependent upon the construction of roads and utilities to service the lots.

By a deed dated January 21, 1972, the subject property was conveyed to Zora Enterprises, Inc. for the consideration of $1.00. Zora Enterprises, Inc. at the time was a corporation which was owned and managed by Joseph P. Zora, Sr. and Glenna M. Zora.

On or about October 7, 1987, the Town of Marion Planning Board endorsed a subdivision plan dated July 16, 1987 submitted by Zora Enterprises for 4 lots (nos. 69, 70, 71, and 72) on the subject property. On or about July 21, 1989 the Town of Marion Planning Board endorsed a subdivision plan dated

November 30, 1988 submitted by Zora Enterprises, Inc. for an additional 18 lots (nos. 73 through 90). A portion of the subdivided land is owned by John H. Nolan, Jr. and is proposed to be developed in conjunction with Mr. Nolan. On or about July 13, 1989, an application (Notice of Intent) under the Wetlands Protection Act was filed by Zora Enterprises, Inc. for the subject property for the construction of roads and associated utilities and drainage structures on the land.

In connection with the filing of the Notice of Intent Zora Enterprises submitted information sufficient to describe the site, the work or the effect of the work on the interests identified in the Wetlands Protection Act including plans showing the location of all wetlands resource areas and the location and construction of the roads, drainage structures and utilities, a wetlands report, drainage calculations, a wildlife habitat report, and replication plan. This information was prepared by expert civil engineers and wetlands scientists. Copies of this information were also sent to the Commonwealth of Massachusetts Department of Environmental Protection Southeast Region Office in Lakeville, MA. On or about August 19, 1989 and August 26, 1989, the Marion Conservation Commission conducted an on site inspection at which the plaintiff and wetlands and engineering experts engaged by Zora Enterprises were present and available to answer questions of the Town of Marion Conservation Commission. The Conservation Commission was not restricted as to the amount of time for the inspection and were allowed to view all of the project site which they wanted to view and allowed to place their own flags purporting to delineate the wetlands resource areas.

On or about September 6, 1989, the Marion Conservation Commission demanded that Zora Enterprises, Inc. provide a plan showing the wetlands delineation line of the Conservation Commission. The Conservation Commission demanded that this

plan be prepared by engineers engaged by Zora Enterprises and at the expense of Zora Enterprises. Because this demand was unreasonable, this demand was refused. Additionally, the then Chairman of the Town of Marion Conservation Commission stated that even if this information was provided that the project would be denied.

On or about September 26, 1989, the Marion Conservation Commission issued a decision (Order of Conditions) denying the project.

On or about October 4, 1989, Zora Enterprises took an appeal (Request for Superseding Order of Conditions) to the Commonwealth of Massachusetts Department of Environmental Protection, Southeast Region office, from the decision of the Marion Conservation Commission denying the project. The Commonwealth of Massachusetts Department of Environmental Protection is hereinafter referred to as "DEP".

On or about December 20, 1989, January 18, 1990, March 13, 1990 and April 4, 1990, the Defendant Diane Boretos, who was the DEP Southeast Region Office field person assigned to review and draft an order on the Request for Superseding Order of Conditions of Zora Enterprises' proposed project. The wetlands expert engaged by Zora Enterprises was present and available to answer questions of Boretos on December 20, 1989, January 18, 1990, and March 13, 1990, and the engineer was present on at least two of these occasions. Boretos was not restricted as to the amount of time for the inspection and was allowed to view all of the project site which she wanted to view and allowed to place her own 'flags' purportedly delineating the wetlands resource areas. On or about April 4, 1990, Boretos finished her on site inspection and 'flagging' and at the site Boretos demanded that Zora Enterprises have a plan prepared by the engineers engaged by Zora Enterprises, at the expense of Zora Enterprises, showing the wetlands delineation line of Boretos. The flags as placed by Boretos delineate an area which

covers approximately 70% of the project site. Counsel for Zora Enterprises in a letter dated April 23, 1990 declined to provide the DEP Southeast Region office with this information in part on the grounds that the wetlands delineation as flagged denied Zora Enterprises all uses of their property.

The Commonwealth contends that there was a delay up until September 17, 1990 because DEP was waiting around for the requested plan from Zora Enterprises. The Commonwealth did not submit any affidavit to that effect, and it does not make sense that they would be waiting for a plan which Zora Enterprises refused, in the April 23, 1990 letter, to provide. Zora Enterprises mentions this contention, because the Appeals Court appeared to base their decision in part on purported evidence of delay being caused by Zora Enterprises.

On or about September 17, 1990 based on the recommendations of Boretos the DEP Southeast Region office issued an order (Superseding Order of Conditions) denying the project of Zora Enterprises on the basis that insufficient information was submitted. During the period from April 3, 1990 to September 17, 1990, Zora Enterprises did not request or cause any delays in the processing of the Request for Superseding Order of Conditions. The Commonwealth did not submit any evidence to rebut this fact.

On or about September 24, 1990 Zora Enterprises filed an appeal (Request for Adjudicatory Hearing) to the Boston office of the DEP from the Superseding Order of Conditions.

On or about February 15, 1994 a hearing was held before an Administrative Law Judge of DEP on the Request for Adjudicatory Hearing of Zora Enterprises. A final decision of the Administrative Law Judge dated

October 14, 1994 reversed the Superseding Order of Conditions, and the Administrative Law Judge found that Zora Enterprises had provided sufficient information. The Administrative Law Judge remanded the matter to the Southeast Region Office for a decision on the merits of the project.

During the period from September 18, 1990 to October 14, 1994, Zora Enterprises did not request or cause any delay in the processing of the Request for Adjudicatory Hearing. Once again, the Commonwealth did not offer any proof to rebut this fact.

During the period that the project had been pending in DEP Zora Enterprises has been denied all economically viable uses of the subject property. Zora Enterprises has been unable to construct any of the subdivision roads except for a short portion of Olde Logging Road which accesses lots 86 and 87 as all other parts of the subdivision are accessed by roads which cross wetlands and require approval under the wetlands protection act or are within the claimed jurisdiction of DEP and the Marion Conservation Commission.

The fair market value of the project site if the project had been processed with normal delays and with the approval of the project under the wetlands protection act was 2.2 million dollars. Lot 86 has not yet been sold, and lot 87 was sold in 1997 for $77,500.00. [1] Lot 69 was sold in 1987 for $25,000.00 to Raymond and Toni Audette. However, in part because there was a delay in the road construction Zora Enterprises was sued by the Audettes and paid a settlement of $35,000.00. Lot 70 was sold in 1987 to Geoffrey and Kathleen Neal, and because there was a delay in the road construction Zora Enterprises was sued and the Neals recovered $15,000.00 which with interest resulted in a payment by Zora Enterprises to the Neals of approximately $24,000.00. Lot 71 was sold to Dorothea Spiro for $94,500.00 and was exchanged for another lot because the road could not be constructed to access Lot 71.

The area shown as Old Town Road on the subdivision plan is not owned by Zora Enterprises. This area is overgrown with trees and other vegetation and is not passable by conventional motor vehicles. This area is not a public way which has been accepted by the Town of Marion and is not maintained by the Town of Marion. On or about April 7, 1998 DEP issued a Corrected Superseding Order of Conditions on the merits allowing the project to proceed according to Zora Enterprises' original plans with some minor modifications to the wetlands delineation line and a slight change in a road location. No appeal has been taken by any party from this Superseding Order of Conditions.

Federal Question Raised

The Petitioners first raised their Fifth Amendment claim against the Commonwealth of Massachusetts in the First Amended Complaint filed with the Commonwealth of Massachusetts, Plymouth Superior Court (docket no.93-0494A) on or about March 23, 1993. [2] In that Complaint the Petitioners also brought a claim under Massachusetts General Laws c. 79 seeking compensation for a taking which was not effected by a formal vote. On or about April 30, 1997, the Defendant Commonwealth of Massachusetts served Defendant Commonwealth's Motion for Summary Judgment. The three grounds for this Motion were as follows:

1. Plaintiff has not yet exhausted its administrative remedies. Therefore, plaintiff does not have a final decision which is an essential element of a regulatory taking claim;
2. Plaintiff cannot obtain taking damages as it acquired the property after wetlands restrictions took effect.
3. The property as a whole retains substantial economic value as that term is defined in the case law, and therefore there has been no taking. On January 20, 1998 Judgment [in favor of the Commonwealth] on Motion to Summary Judgment was entered.

The grounds were stated by the court as follows:

> "1. the Plaintiff has failed to exhaust its administrative remedies.
>
> 2. Property acquired after by plaintiff after the wetlands protection act took effect.
>
> 3. The property as a whole retains a substantial economic value. These reasons are amply supported by defendants memorandum with cited cases on each reason in this court's allowance of the motion for Summary Judgment entered for the defendant." Appendix A. Zora

Enterprises brought an appeal to the Massachusetts Appeals Court from the Judgment of the Superior Court. On March 30, 1999, the Appeals Court (docket no. 98-P-195) issued a decision affirming the judgment in favor of the Commonwealth. The Appeals Court based their decision on their ruling that the delays were not unreasonable and did not reach any of the other issues in the case. Appendix B.

On or about April 16, 1999 Zora Enterprises, Inc. File a Petition for Further Appellate Review with the Massachusetts Supreme Judicial Court (docket no. FAR 10561), which raised the taking by delay issue. This Petition was denied. Appendix C.

Argument

I. The Supreme Judicial Court has not recognized a taking by delay except in the limited circumstances when the property is physically destroyed.

The U.S. Supreme Court in the case of First English Evangelical Lutheran Church of Glendale vs. County of Los Angeles, California, 107 S. Ct. 2378 (1987) recognized that compensation must be paid when the government has taken property by a land-use regulation even in cases in which the taking is temporary. The regulation in the Lutheran case was ultimately found to be invalid, and the time period in question was between the date of the imposition of the regulation to the

date that the regulation was declared invalid. The court stated that:

> "We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us."

This statement suggests that in cases of administrative delays which are not normal, a court could find that a taking had occurred.

The Supreme Judicial court held in the case of Wilson vs. Commonwealth, 413 Mass. 352 (1992), that unreasonable agency delay itself could cause a taking. However, the Appeals Court in the case at bar stated that this case stands for the proposition that unreasonable agency delay resulting in total destruction of the property may constitute regulatory taking. Appendix B.

Zora Enterprises contends that a delay of 5 years from the date (October 4, 1989) of the filing of their Request for Superseding Order of Conditions to the date (October 14, 1994) of the Final Decision of the Administrative Law Judge was not a normal administrative delay or a reasonable administrative delay.

Zora Enterprises would also note that the Appeals Court has omitted the time period from the date of the Request for Superseding Order Conditions (October 4, 1989) to the date of the Superseding Order of Conditions (September 17, 1990) from their calculation of the length of the delay. There is no explanation for this omission.

The Appeals Court also states that Zora Enterprises did not amend the complaint to include the additional delays beyond the filing the complaint in the trial court. Zora Enterprises' complaint does state that Zora Enterprises anticipated additional

delays of at least another three years in DEP.

Evidence in support of Zora Enterprises' contention can be found in DEP's own regulations and policies.

> 310 CMR 10.05(7) provides in relevant part that: "(f) Within seventy (70) days from receipt of such a request, the Department shall issue a Superseding Order unless 2. the Department has requested additional plans, information or documentation pursuant to 310 CMR 10.05(7)(g), in which case the Department shall issue a Superseding Order within forty (40) days of receipt of such plans, information, or documentation, or of the failure of the applicant to comply with such request.
>
> (g) The Department shall notify the applicant within thirty (30) days of receipt of a request for the Department to act if additional information or documentation is necessary to make its determination, provided, however, that further information may be requested should the information supplied in response to the original notification so require."

Zora Enterprises' Request for Superseding Order of Conditions was filed on October 4, 1989. The Superseding Order of Conditions is dated September 17, 1990, 348 days later, and well outside of the 70 days set forth in the regulation above. Even if the request by Boretos at the on site inspection on April 4, 1990 is considered a request for additional information the Superseding Order of Conditions was not timely. First the request for additional information itself was not made within 30 days of the request for superseding order of conditions as required by 310 CMR 10.05(g). Even if the request for additional information was considered timely, the request for additional information was declined by Zora Enterprises in a letter dated April 23, 1990. Under

310 CMR 10.05(7)(f) the Superseding Order of Conditions should have issued 40 days later on June 4, 1990.

In a Directive dated July 7, 1995, David Struhs, the Commissioner of the Department of Environmental Protection mandated a 12 month case flow timeline from the date of the filing of a Request for Adjudicatory Hearing to the date of the Decision. Zora Enterprises filed their Request for Adjudicatory Hearing on September 24, 1990 and the Final Decision did not issue until October 14, 1994 close to 4 years later. Though the Directive was not applicable to the Zora Enterprises proceedings which predated the Directive, the Directive is evidence of what the DEP would consider a normal or acceptable delay.

Because the time spent by Zora Enterprises in the DEP administrative proceedings was well outside their own regulations and the directive of their Commissioner, the delay in these proceedings was not normal, was extraordinary and unreasonable. During this time period Zora Enterprises was denied all economically viable uses of their property.

CONCLUSION

For the reasons set forth above this Petition for Writ of Certiorari should be granted.

PETITIONER
ZORA ENTERPRISES, INC.
By: _____
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[1] Since the Judgment was entered in this case, lot 86 was sold in 1998 for $77,500.00.
[2] The claims against the Defendant Boretos were dismissed by the court .

APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss SUPERIOR COURT DEPARTMENT
DEPT. OF THE TRIAL COURT
CA93-0494A

ZORA ENTERPRISES, INC.
VS.
DIANE BORETOS, ET AL

JUDGMENT ON MOTION TO SUMMARY JUDGMENT
(PURSUANT TO MASS. RULES OF CIVIL PROCEDURE 56)

This action came on to be heard on the motion of the defendant Commonwealth of Massachusetts for Summary Judgment and the Court, Connon, J presiding, having allowed said motion, it is ordered that the Complaint of the plaintiff be and hereby is dismissed as to the defendant Commonwealth of Massachusetts on the following grounds:

1. Plaintiff has failed to exhaust its administrative remedies.
2. Property acquired by plaintiff after the wetlands protection act took effect .
3. The property as a whole retains a substantial economic value.

These reasons are amply supported by defendants memorandum with cited cases on each reason in this court's allowance of the motion for Summary Judgment entered for the defendant.

It is further ordered that the defendant Commonwealth of Massachusetts recover its costs.

Dated at Plymouth, this 9th day of January, 1998.

By the Court(Connon, J)

Entered January 20, 1998 **s/Francis R. Powers**
FRANCIS R. POWERS
CLERK

nmc/MAI,MAK

APPENDIX B

Commonwealth of Massachusetts
Appeals Court
Clerk's Office
1500 New Court House, Boston, Massachusetts 02108
(617) 725-8106

Margaret A. Ishihara, Esquire
Fleming & Ishihara
86 Church Street
P.O. Box 396
Mattapoisett, MA 02739

RE: Docket No. 98-P-0195

ZORA ENTERPRISES, INC.
vs.
DIANE BORETOS

NOTICE OF DOCKET ENTRY

Please take note that on March 10, 1999, the following entry was made on the docket of the above-referenced case:

Decision: Rule 1:28 (W KP K). Notice. (See image on file.) Judgement affirmed.

Very truly yours.
The Clerk's office

Dated: **March 30, 1999**

To: Margaret A. Ishihara, Esquire
Michelle A. Kaczynski, Esquire

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

98-P-195

ZORA ENTERPRISES, INC.

vs.

COMMONWEALTH OF MASSACHUSETTS

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Zora Enterprises, Inc. (Zora), appeals from the decision of the Superior Court granting the Commonwealth's motion for summary judgment on Zora's claim seeking compensation for an alleged temporary regulatory taking of its property. Zora's complaint asserts that the Department of Environmental Protection's nearly one-year delay in issuing a superseding order of conditions and the lack of an adjudicatory hearing in the two and one-half years between the time that Zora requested an adjudicatory hearing and the date that it filed its complaint in the Superior Court constitute a temporary regulatory taking of its property.[1] In Steinbergh v. Cambridge, 413 Mass. 736, 743 (1992), cert. denied, 113 S.Ct. 2338 (1993), the court noted that delays that commonly occur in seeking regulatory approvals have not traditionally been viewed as constituting regulatory takings. "The fact that the plaintiffs could not make immediate optimum use of their property . . . does not constitute a taking."

[1] Although the actual delay from the request for an adjudicatory hearing until a hearing was conducted ended up being three years and five months (and more than four years before a decision was entered), Zora never amended its complaint to include the additional delay.

Id. at 743-744. See also Agins v. Tiburon, 447 U.S. 255, 263 n.9 (1980) (holding that precondemnation activities which limited appellants' ability to sell their property but "which did not result in successful prosecution of an eminent domain claim" did not so burden the appellants' enjoyment of their property as to constitute a taking). "Mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.'" Agins v. Tiburon, supra. Cf. Wilson v. Commonwealth, 413 Mass. 352, 355 (1992) (unreasonable agency delay resulting in total destruction of property may constitute regulatory taking).

Notwithstanding the rather strong language in Steinbergh and the clearly distinguishable extenuating circumstances in Wilson, Zora contends that it has stated a temporary taking claim because the agency delay in this case was unreasonable or extraordinary. Nothing in the summary judgment record, however, supports Zora's claim that the delay was unreasonable or extraordinary. Zora's citation to a 1995 directive that recommends a twelve month time line from the date of the filing of a request for an adjudicatory hearing and the date the hearing is conducted is not helpful, as Zora's request was submitted in 1990, five years before the cited directive. By 1995, the department may have acquired additional staff or-made other changes that would make an aspirational twelve-month time line workable. Zora cites to 310 Code Mass. Regs § 10.05(7), the 1987 version of which was in effect at the time of Zora's request for a superseding order of conditions. Under that regulation, the department was to respond to a request for a superseding order of conditions within seventy days, or within forty days from the owner's submission of additional requested information or the owner's failure to submit such requested information.

Zora musters no authority, however, for the proposition that an agency's failure to meet its self-imposed time standards can constitute a regulatory taking, or that its failure to adhere to those standards constitutes a delay that is "unreasonable" as matter of law. When the Legislature desires to make the failure of an administrative agency to adhere to time lines consequential, it has known how to do so. Consider, for example, the constructive grant of relief in the following situations: by a permit-granting authority under G. L. c. 40A, § 15, if it fails to act within 100 days of the filing of an appeal; of board of health approval of a subdivision plan under G. L. c. 41, § 81U, if it fails to act within forty-five days; and of planning board approval of a definitive subdivision plan under G. L. c. 41, § 81U. Finally, it is apparent from the record that Zora was responsible for at least some of the delay in issuing the superseding order of conditions.

Because on this record we do not conclude that the delays of which Zora complains were unreasonable, we need not reach the parties' remaining arguments.

Judgment affirmed.

By the Court (Warner, C.J.,
Kaplan & Kass, JJ.),

s/Ashley Ahearn
ASHLEY AHEARN
Clerk

Entered: **March 30, 1999.**

Commonwealth of Massachusetts
Appeals Court for the Commonwealth
At Boston

In the case no. 98-P-195

ZORA ENTERPRISES INC.

vs.

COMMONWEALTH OF MASSACHUSETTS

Pending in the Superior
Court for the County of Plymouth
Ordered, that the following entry be made in the docket:

Judgement affirmed

by the Court,

s/Ashley Ahearn
ASHLEY AHEARN
Clerk

Date: **March 30, 1999**

APPENDIX C

Supreme Judicial Court for the
Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

Margaret A. Ishihara, Esquire
Fleming & Ishihara
86 Church Street
P.O. Box 396
Mattapoisett, MA 02739

RE: Docket No. FAR-10561

ZORA ENTERPRISES, INC.
vs.
COMMONWEALTH

NOTICE OF DENIAL OF F. A.R. APPLICATION

Please take note that the above-captioned Application for Further Appellate Review had been considered by the Court and is denied.

Jean M. Kennett, Clerk

Dated: **June 3, 1999**

To: Margaret A. Ishihara, Esquire
Michelle A. Kaczynski, A.A.G.